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DATO' RAMESH RAJARATNAM

v.

DATIN ZALEHA ABD RAHMAN & ORS

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COURT OF APPEAL, PUTRAJAYA
AZAHAR MOHAMED JCA
MOHAMAD ARIFF YUSOF JCA
HAMID SULTAN ABU BACKER JCA
[CIVIL APPEAL NO: W-03(IM)-161-09-2013]

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3 JUNE 2014

BANKRUPTCY: *Notice - Setting aside - Application for - Bankruptcy notice filed before issuance of letters of administration - Whether strict rule that letters of administration must be issued by High Court before any*

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action taken for benefit of estate - Exception to strict rule - Order 15 r. 6A Rules of Court 2012 - Special circumstances - Whether bankruptcy proceeding to protect and preserve interest of estate of deceased

The appellant appealed against the decision of the High Court in

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disallowing the appellant's appeal against refusal to set aside the bankruptcy notice. The bankruptcy notice was filed three months before the appointment of the respondents as the administrators for the estate of the deceased. At the date of hearing of the appeal, it was conceded that even though the court had granted

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order in terms of the application for the respondents to be appointed as administrators, the sealed copy of the order had not been extracted.

Held (allowing appeal; setting aside bankruptcy notice)
Per Hamid Sultan Abu Backer JCA delivering the judgment

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of the court:

(1) The strict rule is that the letters of administration must be issued by the High Court to the administrator and/or administratrix before any action can be taken for the benefit

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of the estate. However, limited exceptions are provided under O. 15 r. 6A of the Rules of Court 2012. The strict rule was further whittled down by the Federal Court in *Al Rashidy Kassim & Ors v. Rosman Roslan* ('*Al Rashidy*') where it held that, if there are 'special circumstances', the administrator will

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have *locus* to proceed with the legal proceedings, notwithstanding the strict provision of s. 39(1) of the Probate and Administration Act 1959. (para 2)

(2) The courts will not ordinarily grant *locus* unless it can be shown that it is necessary and expedient to protect and preserve the interest of the estate of the deceased, in light of the decision of *Al Rashidy*. The institution of a bankruptcy proceeding against a purported debtor of the estate did not fall within the restrictive test. The appellant's claim was for a sum of more than what he had to return to the estate in consequence of the court order and therefore, the bankruptcy proceeding could not be said to be for the purpose of protecting and preserving the assets of the estate of the deceased. (paras 5 & 14)

(3) The Bankruptcy Act 1967 only gives *locus standi* to a creditor and not to an administrator who had not extracted the sealed order, unless the issue of *locus standi* had been condoned by the order of the court. Bankruptcy proceedings are *quasi* penal proceedings. In consequence, strict letters of the law need to be followed failing which it may breach art. 5(1) of the Federal Constitution. (para 15)

Bahasa Malaysia *Translation Of Headnotes*

Perayu merayu terhadap keputusan Mahkamah Tinggi dalam menolak rayuan perayu terhadap penafian pengenepian notis kebankrapan. Notis kebankrapan telah difailkan tiga bulan sebelum pelantikan responden-responden sebagai pentadbir-pentadbir harta pusaka si mati. Pada tarikh perbicaraan rayuan, adalah diakui bahawa walaupun mahkamah telah memberikan perintah seperti yang dipohon dalam permohonan responden-responden untuk dilantik sebagai pentadbir-pentadbir, salinan meterai perintah tersebut belum dikeluarkan.

Diputuskan (membenarkan rayuan; mengenepikan notis kebankrapan)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Perintah ketat adalah bahawa surat pentadbiran mesti telah dikeluarkan oleh Mahkamah Tinggi kepada pentadbir sebelum apa-apa tindakan boleh diambil bagi faedah harta pusaka. Walau bagaimanapun, pengecualian yang terhad diperuntukkan di bawah A. 15 k. 6A Kaedah-Kaedah Mahkamah 2012. Perintah ketat tersebut dilonggarkan selanjutnya oleh

Mahkamah Persekutuan dalam *Al Rashidy Kassim & Ors v. Rosman Roslan* ('*Al Rashidy*') di mana ia memutuskan bahawa, jika wujud 'keadaan istimewa', pentadbir akan mempunyai *locus* untuk meneruskan dengan prosiding undang-undang, walaupun terdapat peruntukan ketat s. 39(1) Akta Probet dan Pentadbiran 1959.

(2) Mahkamah tidak akan biasanya memberikan *locus* kecuali boleh ditunjukkan bahawa ia adalah perlu dan wajar untuk melindungi dan memelihara kepentingan harta pusaka si mati, berikutan keputusan dalam *Al Rashidy*. Pemulaan prosiding kebankrapan terhadap penghutang harta pusaka tidak terangkum dalam ujian yang terhad tersebut. Tuntutan perayu adalah bagi jumlah yang melebihi daripada apa yang perlu dipulangkannya kepada harta pusaka berikutan perintah mahkamah dan dengan itu, prosiding kebankrapan tidak boleh dikatakan adalah bagi tujuan melindungi dan memelihara aset-aset harta pusaka si mati.

(3) Akta Kebankrapan 1967 hanya memberikan *locus standi* kepada pemiutang dan bukan kepada pentadbir yang belum mengeluarkan perintah meterai, kecuali isu *locus standi* telah dimaafkan melalui perintah mahkamah. Prosiding kebankrapan adalah prosiding separa jenayah. Dengan itu, surat-surat perundangan yang ketat perlu dipatuhi dan kegagalannya akan menjurus kepada pelanggaran per. 5(1) Perlembagaan Persekutuan.

Case(s) referred to:

Al Rashidy Kassim & Ors v. Rosman Roslan [2007] 3 CLJ 361 FC ***(dist)***

Ang Hoi Yin v. Sim Sie Hau [1968] 1 LNS 7 HC ***(refd)***

Chong Ah Guan & Anor v. Amanah Merchant Bank Berhad & 2 Ors [1993] 1 LNS 17 HC ***(refd)***

Chor Phaik Har v. Farlim Properties Sdn Bhd [1997] 4 CLJ 393 FC ***(refd)***

Ingall v. Moran [1944] 1 KB 160 ***(refd)***

Jayasena v. R [1970] AC 618 ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Ooi Jim & Anor v. Ai Eit & Ors [1974] 1 LNS 108 FC ***(refd)***

P Govindasamy Pillay & Sons Ltd v. Lok Seng Chai & Ors [1961] 1 LNS 78 HC ***(refd)***

Selvarajah & Anor v. Official Administrator & Anor [1978] 1 LNS 246 ***(refd)***

Sobri Arshad v. Associated Tractors Sdn Bhd [1991] 1 CLJ 798; [1991] 3 CLJ (Rep) 756 HC ***(refd)***

Wong Moy v. Soo Ah Choy [1996] 3 SLR 398 ***(refd)***

Legislation referred to:
Federal Constitution, art. 5(1)
Probate and Administration Act 1959, s. 39(1)
Rules of Court 2012, O. 15 r. 6A

Other source(s) referred to:
Jana b's Key To Civil Procedure, 5th edn, pp 143 & 144

For the appellant - C Paul Aisu (Sandosh Anandan with him); M/s Sandosh Anandan
For the respondents - Allan Wong (Alex Lim with him); M/s Zain Megat & Murat

[Appeal from High Court, Kuala Lumpur; Bankruptcy No: 29-5017-09-2012]

Reported by S Barathi

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant (judgment debtor) appeals against the decision of the High Court which did not allow the appellant's appeal against the decision of the Senior Assistant Registrar (SAR) who refused to set aside the bankruptcy notice on the ground that when the bankruptcy notice was issued by the respondent as administrators of the deceased estate, the letters of administration was not extracted.

[2] The strict rule is that the letters of administration must be issued by the High Court to the administrator and/or administratrix before any action can be taken for the benefit of the estate. (See *Jana b's Key To Civil Procedure*, 5th edn., pp. 143 and 144). Some limited exceptions are found in O. 15 r. 6A of RC 2012. In *Ang Hoi Yin v. Sim Sie Hau* [1968] 1 LNS 7; [1969] 2 MLJ 3, the plaintiff's administratrix brought an action against the defendant without having extracted the letters of administration even though it had been granted by the court. The defendant entered a conditional appearance and applied to the court to set aside the writ on the ground that the plaintiff had not acquired the *locus standi* yet. The court held that since the plaintiff had not extracted the grant of letters of administration, she had no power to sue as administratrix and therefore the suit was a nullity and must be set aside.

The strict rule recently had been whittled down by the Federal Court to say if there are 'special circumstances' the administrator will have *locus* to proceed with the legal proceedings. (See *Al Rashidy Kassim & Ors v. Rosman Roslan* [2007] 3 CLJ 361). This is notwithstanding the strict provision of s. 39(1) of the Probate and Administration Act 1959 which states:

> 39. (1) Where a person dies intestate his movable and immovable property until administration is granted in respect thereof shall vest in the Corporation in the same manner and to the same extent as it vests in the Probate Judge in England.

[3] It must be noted that the 'corporation' under s. 39 means 'Official Administrator'. By virtue of s. 39, the law vest the right to sue and be sued to the 'Official Administrator'. If anybody inter meddles with the estate of the deceased the 'Official Administrator' can be requested to take action. If he fails the interested parties can sue the '*de son tort*' and also name the 'Official Administrator' as one of the defendants to obtain appropriate orders against the '*de son tort*' in the presence of the 'Official Administrator' though the 'Official Administrator' cannot be sued for the liability of the estate, etc. (See *Selvarajah & Anor v. Official Administrator & Anor* [1978] 1 LNS 246; [1978] 2 MLJ 108). The Federal Court's decision of *Al Rashidy* did not at all discuss the section when by judicial fiat it had created exception to well established principles of *Ingall v. Moran* followed in Malaysia. In any event this court is bound by the decision of the Federal Court notwithstanding the exception to the rule is against the intent and spirit of the statute. (See *Jayasena v. R* [1970] AC 618; *Ingall v. Moran* [1944] 1 KB 160).

[4] When 'special circumstances' are relied on the burden will be on the purported administrator to demonstrate on the issue of *locus standi* in the proceedings or by way of affidavits as the case may be before obtaining any orders from the court. In essence, those who rely on special circumstances do not *per se* have a legal right such as administrator lawfully appointed by the court, with the sealed order extracted.

[5] In light of *Al Rashidy*'s case the courts will not ordinarily grant *locus* unless it can be shown that it was necessary and expedient to protect and preserve the interest of the deceased's estate. In view of the statute which deals with probate and administration of estates, the threshold for the purported

administrator is very high to satisfy the *locus standi* test. It all depends on the facts, circumstances, urgency of the matter, etc. The reason why letters of administration must be obtained before commencement of the action for the benefit of estate is well established and the jurisprudence need not be set out here. However, now the Rules of Court provides limited orders to be granted for the estate to be represented in an action or pending action as the court may think fit.

Brief Facts

[6] The learned High Court Judge had written a 17 pages judgment setting out the facts in detail. We do not wish to labour on what has been said save to deal with the core issues.

[7] The respondents are administrators of the deceased, Shahrani bin Abdullah. It is not in dispute the appellant has filed an action against the deceased while he was alive. Subsequent to the action, the appellant had garnished the money of the deceased amounting to RM2,026,536.38. The issue of garnishment was appealed to the Court of Appeal. The Court of Appeal had ordered the appellant to repay the money. The appellant is seeking leave to appeal against the said order to the Federal Court. Subsequent to the order, the appellant had obtained a stay of all proceedings in the High Court from the Court of Appeal before a different corum. Before us the appellant argues that the first order of the Court of Appeal was stayed. The respondents say only the matters in the High Court was stayed and not the first Court of Appeal order or the bankruptcy action which is a different action relating to recovery only.

[8] In essence there is *prima facie* a dispute as to whether the first order of the Court of Appeal was stayed more so when the second order of the Court of Appeal was sought by the appellant when they have specifically asked for the first order of the Court of Appeal to be stayed.

[9] On the issue of bankruptcy notice, it is not in dispute that the bankruptcy notice was filed on 4 September 2012 three months before the appointment of the respondent as administrators for the estate of the deceased. At the date of hearing of the appeal, learned counsel conceded that even though the court has granted order in terms of the application for the

respondents to be appointed as administrators the sealed copy of the order had not been extracted as at 28 November 2012 ie, the date of hearing of this appeal.

Submission

[10] The submission of learned counsel for the appellant can be summarised as follows:

(i) Even a person who has been granted letters of administration cannot sue or be sued in respect of the estate or its liabilities until the grant has been extracted. And relies on a number of cases to support the proposition, namely: (i) *P Govindasamy Pillay & Sons Ltd v. Lok Seng Chai & Ors* [1961] 1 LNS 78; [1961] MLJ 89; (ii) *Ang Hoi Yin v. Sim Sie Hau* [1968] 1 LNS 7; [1969] 2 MLJ 3; (iii) *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1997] 4 CLJ 393; (iv) *Chong Ah Guan & Anor v. Amanah Merchant Bank Berhad & 2 Ors* [1993] 1 LNS 17.

(ii) Only in very limited circumstances can the administrator maintain the action and to do so the burden lies on him to demonstrate special circumstances and the test set out in *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1; [2004] 1 MLJ 257 as applied in the instant case by the learned High Court Judge is not the correct test for administration proceedings.

(iii) Special circumstance in 'administration of estates' here necessarily means the action to preserve and protect the estate of the deceased in question. And relies on a number of cases namely: (i) *Al Rashidy Kassim & Ors v. Rosman Roslan* [2007] 3 CLJ 361; (ii) *Ooi Jim & Anor v. Ai Eit & Ors* [1974] 1 LNS 108; [1977] 2 MLJ 105.

[11] Learned counsel for the respondents agrees with the proposition laid out by the appellant and relies heavily on cases which had whittled down the strict rule enunciated in *Ingall v. Moran* [1944] 1 KB 160. And attempts to argue on the facts of the case that they have *locus standi* to pursue with the bankruptcy proceeding notwithstanding the facts. In our view:

(i) The issue whether the Court of Appeal has stayed its first orders has not been properly clarified or determined and it is not our function at the present appeal to do so;

(ii) Whether the stay will also relate to the civil suit as well as bankruptcy proceeding has also not been properly clarified or determined and it is not our function at the preset appeal to do so;

(iii) Whether in fact the respondents had before getting the bankruptcy notice issued demonstrated to the court that they have *locus standi* is also not clear. And for this purpose it would have been most appropriate to obtain leave to commence bankruptcy proceeding by way of originating summons to cloak the administrators with *locus standi* in reliance of *Al Rashidy* case taking into consideration the strict provision of s. 39 of the Probate and Administration Act 1959, as a matter of law vest '*locus standi*' to the 'Official Administrator'.

[12] We have read the appeal records, the submissions of the parties in detail. We thank counsels for the comprehensive submissions. After much consideration to the submission of learned counsel for the respondents, we take the view the appeal must be allowed. Our reasons *inter alia* are as follows:

(a) Malaysian courts have repeatedly given recognition to the rule that an administrator must have the sealed order of the High Court before getting entangled in any legal proceedings in court.

(b) Quite recently in the case of *Al Rashidy Kassim & Ors v. Rosman Roslan* [2007] 3 CLJ 361, the Federal Court in reliance of the Singapore Court of Appeal's decision in *Wong Moy v. Soo Ah Choy* [1996] 3 SLR 398 had whittled down the strict rule expounded in *Ingall v. Moran* [1944] 1 KB 160 and the law set out in s. 39 of Probate and Administrative Act 1959 in exceptional cases where the purported administrator can show special circumstances. The threshold test set out by the Federal Court is high.

[13] In our view, the facts of that case and the present case has no resemblance to attract the 'special circumstances' concept. In *Al Rashidy*, the Federal Court on the facts held:

> (1) Special circumstances should not be confined solely to cases where the personal representative had defaulted in recovering the property of the estate; all the circumstances of the case ought to be considered by the court in arriving at a just result (*Wong Moy*

A *(Administratrix of the Estate of Theng Chee Khim, (deceased) v. Soo Ah Choy* (foll)). Also, the beneficiary has at least an equity in the estate of the deceased to entitle the beneficiary to seek on behalf of the estate the remedy of a declaratory judgment (*Re Atkinson* (foll); *Omar Ali Mohd & Ors v. Syed Jajaralsadeq Abdulkadir Alhadad & Ors* (foll)).

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(2) In the present case, the action was commenced by the beneficiaries of the estate in order to regain the said land from the respondent whom they alleged had, by fraudulent means, transferred the land to himself. The respondent had also entered
C upon the said land and damaged the fruit trees and demolished buildings found there. Further, the said land was liable to be sold by the respondent to a third party. In that event, the said land may be lost forever. This becomes more urgent in view of the decision of this court in *Adorna Properties Sdn Bhd v. Boonsom Boonyamit* which conferred immediate indefeasible title to a
D purchaser in good faith for valuable consideration. The appellants thus had to act fast in order to protect and preserve the deceased's estate. Therefore, on the facts of this case, there existed special circumstances for the beneficiaries to commence legal action against the respondent qua beneficiaries for the
E purpose of protecting and preserving the assets of the estate. Quite apart from that, the beneficiaries in the present case had at least an equity in the deceased's estate that would entitle them to seek a declaratory judgment. Thus, on the above grounds, the appellants had the *locus standi* to commence this action at least for the limited purpose of protecting and preserving the estate's
F assets.

[14] We agree with the learned counsel for the appellant, the learned Judicial Commissioner was wrong in relying on *Kosma*'s case in the application of 'special circumstances' concept. The test
G for administration proceeding for *locus standi* must be at least for the purpose of protection and preserving the estate's assets. We do not see how by instituting a bankruptcy proceedings against a purported debtor of the estate will fall within the restrictive test. In addition, in the instant case the appellant is also claiming a sum
H of more than what he has to return to the estate in consequence of the court order. It may have been different if the appellant as debtor is attempting to dissipate his property to defeat the deceased estate's claim. On such facts it may be quite possible to attract the 'special circumstances' concept. A bankruptcy
I proceeding cannot be said to be for the purpose of protecting and preserving the deceased estate's assets.

[15] In addition, the Bankruptcy Act only gives *locus standi* to a creditor and not to an administrator who has not extracted the sealed order, unless the issue of *locus standi* has been condoned by order of court. Bankruptcy proceedings are quasi-penal proceedings. (See *Sobri Arshad v. Associated Tractors Sdn Bhd* [1991] 1 CLJ 798; [1991] 3 CLJ (Rep) 756; [1991] 3 MLJ 32). In consequence, strict letters of the law need to be followed failing which it may breach art. 5(1) of the Federal Constitution which reads as follows:

> 5. (1) No person shall be deprived of his life or personal liberty save in accordance with law.

[16] For reasons stated above the appeal is allowed with costs of RM15,000 here and below. The bankruptcy notice is set aside. Deposit is refunded.

We hereby order so.